STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
(Sawyer P.J., Smolenski and Murray JJ.)

BRUCE B. FEYZ, an Individual,
Plaintiff-Appellees,
v

MERCY MEMORIAL HOSPITAL, MEDICAL STAFF OF MERCY MEMORIAL HOSPITAL, RICHARD HILTZ, JAMES MILLER, D.O., JOHN KALENKIEWICZ, M.D., J. MARSHALL NEWBERN, D.O., and ANTHONY SONGCO, M.D.
Defendants-Appellants.
_____/

Supreme Court
No.: 128059

Court of Appeals
Case No.: 246259

Monroe County Circuit Court
Court Case No.: 02-14174-CZ

BRIEF FOR DEFENDANTS-APPELLANTS MERCY MEMORIAL HOSPITAL, MEDICAL STAFF OF MERCY MEMORIAL HOSPITAL, RICHARD HILTZ, JAMES MILLER, D.O., JOHN KALENKIEWICZ, M.D., J. MARSHALL NEWBERN, D.O., and ANTHONY SONGCO, M.D.

ORAL ARGUMENT REQUESTED

KITCH DRUTCHAS WAGNER
VALITUTTI & SHERBROOK
SUSAN HEALY ZITTERMAN (P33392)
KAREN B. BERKERY (P38698)
Attorneys for Mercy Memorial Hospital, Medical Staff of Mercy Memorial Hospital, Richard Hiltz, James, Miller, D.O., John Kalenkiewicz, M.D., J. Marshall Newbern, D.O., and Anthony Songco, M.D.
One Woodward Avenue, Suite 2400
Detroit, MI 48226
(313) 965-7905

TABLE OF CONTENTS

PAGE

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485
(313) 965-7900

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MICHIGAN 48226-5485
(313) 965-7900

INDEX OF AUTHORITIES

CASES **PAGE**

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485
(313) 965-7900

Kitch Drutchas
Wagner Valitutti &
Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE,
SUITE 2400
DETROIT, MICHIGAN
48226-5485
(313) 965-7900

STATUTES, COURT RULES AND OTHER AUTHORITIES

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MICHIGAN 48226-5485
(313) 965-7900

Kitch Drutchas
Wagner Valitutti &
Sherbrook
ATTORNEYS AND COUNSELLORS
One Woodward Avenue,
Suite 2400
Detroit, Michigan
48226-5485

(313) 965-7900

STATEMENT REGARDING JURISDICTION

Defendants appeal by leave granted by this Court by order of December 26, 2005. This Court has jurisdiction pursuant to MCR 7.301(A)(2).

Kitch Drutchas
Wagner Valitutti &
Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue,
Suite 2400
Detroit, Michigan
48226-5485

(313) 965-7900

QUESTIONS PRESENTED FOR REVIEW

I

WHETHER THE MICHIGAN COURT OF APPEALS MAJORITY ERRED IN DEFYING MCR 7.215(J) (1), STARE DECISIS, AND COMPELLING PUBLIC POLICY CONSIDERATIONS WHEN IT IGNORED LONGSTANDING, UNWAVERING PRECEDENT THAT CONTRACT AND RELATED TORT CLAIMS THAT REQUIRE COURTS TO INQUIRE INTO A HOSPITAL'S MEDICAL STAFFING DECISIONS ARE NOT SUBJECT TO JUDICAL REVIEW?

Defendants Mercy Memorial Hospital, Medical Staff of Mercy Memorial Hospital, Richard Hiltz, James, Miller, D.O., John Kalenkiewicz, M.D., J. Marshall Newbern, D.O., and Anthony Songco, M.D., submit the answer is "Yes."

The trial court held that the judicial nonreview doctrine applied.

Plaintiff asserts the answer is "No."

The Court of Appeals held the answer is "No."

II

WHETHER THE COURT OF APPEALS ERRED IN CREATING A "PER SE" RULE THAT ALL CIVIL RIGHTS CLAIMS NECESSARILY ENTAIL "MALICE" SO AS TO ELIMMINATE PEER REVIEW IMMUNITY, MCL 331.531

Defendants Mercy Memorial Hospital, Medical Staff of Mercy Memorial Hospital, Richard Hiltz, James, Miller, D.O., John Kalenkiewicz, M.D., J. Marshall Newbern, D.O., and Anthony Songco, M.D., submit the answer is "Yes."'

The trial court held that the judicial nonreview doctrine applied.

Plaintiff asserts the answer is "No."

The Court of Appeals held the answer is "No."

Kitch Drutchas
Wagner Valitutti &
Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE,
SUITE 2400
DETROIT, MICHIGAN
48226-5485

(313) 965-7900

III

WHETHER THE COURT OF APPEALS MAJORITY CLEARLY ERRED IN REFUSING TO APPLY PEER REVIEW IMMUNITY TO THE COMMON LAW CLAIMS AGAINST THE MEDICAL STAFF EXECUTIVE COMMITTEE BASED ON THE MISTAKEN AND INEXPLICABLE STATEMENT THAT DEFENDANTS HAD NOT "ARGUED" THAT THE MEDICAL STAFF EXECUTIVE COMMITTEE CONSTITUTED A PEER REVIEW COMMITTEE?

Defendants Mercy Memorial Hospital, Medical Staff of Mercy Memorial Hospital, Richard Hiltz, James, Miller, D.O., John Kalenkiewicz, M.D., J. Marshall Newbern, D.O., and Anthony Songco, M.D., submit the answer is "Yes."

The trial court held that the judicial nonreview doctrine applied.

Plaintiff asserts the answer is "No."

The Court of Appeals held the answer is "No."

IV

WHETHER, ALTERNATIVELY, PLAINTIFFS' TORT AND CIVIL RIGHTS CLAIMS AGAINST THE EXECUTIVE COMMITTEE AND OTHER DEFENDANTS PREMISED ON THE HPRP REFERRAL ARE NOT REVIEWABLE DUE TO DEFENDANTS' IMMUNITY FROM LIABILITY PURSUANT TO MCL 333.16244 (1) FOR REPORTING PLAINTIFF'S CIRCUMSTANCES TO THE HEALTH PROFESSIONAL RECOVERY PROGRAM?

Defendants Mercy Memorial Hospital, Medical Staff of Mercy Memorial Hospital, Richard Hiltz, James, Miller, D.O., John Kalenkiewicz, M.D., J. Marshall Newbern, D.O., and Anthony Songco, M.D., submit the answer is "Yes."

The trial court held that the judicial nonreview doctrine applied.

Plaintiff asserts the answer is "No."

The Court of Appeals did not address this issue.

Kitch Drutchas
Wagner Valitutti &
Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE,
SUITE 2400
DETROIT, MICHIGAN
48226-3485

(313) 965-7900

STATEMENT OF FACTS

Defendants Mercy Memorial Hospital, Medical Staff Of Mercy Memorial Hospital, Richard Hiltz, James Miller, D.O., John Kalenkiewicz, M.D., J. Marshall Newbern, D.O., and Anthony Songco, M.D., appeal by leave granted by this Court by order of December 16, 2005 (Apx 32a), from the published decision of the Court of Appeals, 264 Mich App 699; 692 NW2d 416 (2005) (Apx 10a). The Court of Appeals, in an opinion by Judge Sawyer in which Judge Smolenski concurred, and an opinion by Judge Murray concurring in part and dissenting in part, reversed the December 27, 2002, order of Monroe County Circuit Court Judge Joseph A. Costello, Jr., granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) (Apx 4a).

Underlying "Facts" As Alleged In The Complaint

Plaintiff Dr. Bruce Feyz brought this suit seeking damages and injunctive relief for allegedly wrongful corrective action taken against him by Mercy Memorial Hospital pursuant to peer/professional review procedures outlined in the bylaws of the medical staff of the Hospital. At all times pertinent, and currently, Dr. Feyz is a physician and member of the medical staff with staff privileges at Mercy Memorial Hospital (Complaint, ¶ 15, Apx 35a).

Staff privileges (sometimes called "clinical privileges" or simply "privileges") represent formalized permission given by a hospital to a physician as part of the credentialing process to treat specific types of conditions or perform specific types of services or procedures within the hospital based on the physician's experience, training and certain performance criteria. See generally, Muzquiz v WA Foote Memorial Hospital, 70 F3d 422 (CA 6, 1995), describing the process. Pursuant to statute, MCL 333.21513, Michigan hospitals are "responsible for selection of the medical staff, and

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485
(313) 965-7900

quality of care rendered in the hospital," and must ensure that physicians are "granted hospital privileges consistent with their individual training, experience, and other qualifications." Hospitals must also ensure that the medical staff performs "an effective review of the professional practices in the hospital for the purpose of reducing morbidity and mortality and improving the care provided in the hospital for patients." Id.

The medical staff credentialing, disciplinary, and corrective action processes at Mercy Memorial Hospital, as at other hospitals in Michigan, are designed to meet these statutory responsibilities. These peer review processes are outlined in hospital and medical staff bylaws. See generally, Dye v St John Hospital and Medical Center, 230 Mich App 661; 584 NW2d 747 (1998), Muzquiz v WA Foote Memorial Hospital, supra; see also excerpt of the Mercy Memorial Medical Staff Bylaws, Article VII, attached as exhibit 2 to plaintiff's response to the motion for summary disposition, (Apx 108a-123a).

Plaintiff filed this suit in 2002, naming as defendants Mercy Memorial Hospital, its Medical Staff, the President of the Hospital, Richard Hiltz, the former Chief of Staff and Chairman of the Executive Committee of the Medical Staff, James Miller, D.O., and three medical staff members who had served on an "Ad Hoc Investigatory Committee" appointed by the Executive Committee, Doctors Kalenkiewicz, Newbern, and Songco (Complaint, ¶¶ 13-16, Apx 35a). In the 32-page complaint, plaintiff alleged that the Hospital and various peer review Committees of the Medical Staff failed to cooperate with him regarding certain patient care he desired be provided by nurses, and that he was improperly disciplined and placed on probation through professional/peer review investigations and proceedings conducted by the medical staff of Mercy Memorial Hospital (Apx 33a-62a).

Kitch Drutchas
Wagner Valitutti &
Sherbrook
ATTORNEYS AND COUNSELORS
One WOODWARD AVENUE,
SUITE 2400
DETROIT, MICHIGAN
48226-5485

(313) 965-7900

Plaintiff's dispute with the Hospital, its Medical Staff, and the peer review process initially began in 1992. This was as a consequence of Dr. Feyz's actions in 1992 and thereafter in insisting that Mercy Memorial Hospital's nursing staff implement Dr. Feyz's self-proclaimed "standardized" orders. ("Orders A-D") regarding nursing assessment of a patient's medication history (Complaint, ¶¶ 17-23, 34, Apx 35a-37a, 40a).

Dr. Feyz had unilaterally concluded that standard and accepted nursing practice left "an unnecessary risk of home medication errors," and that nurses should comply with his laundry list of activities and conduct in every case a detailed investigation into the medications a patient was taking at home. Id. (This investigation required by his "standard orders A-D" included directing that the nurses ("A") insist that every patient's family bring in all medications from home, ("B") ask the patient if the containers belong to the medications, and if not, sending the medication to the pharmacy for identification, ("C") require the patient look at the medications in each container, and telling how the patient has been taking them at home, and ("D") list the medications as the patient is actually taking them at home, Complaint, ¶ 22 (A-D), Apx 37a).

Hospital administration, as well as the Medical Staff Utilization Committee and Medical Staff Quality Assurance Committee (two peer review committees of the Medical Staff) determined that Dr. Feyz's "standardized orders A-D" were interfering with standard and accepted nursing practices, and inappropriately required nurses to practice beyond the parameters of their license. Consequently, as plaintiff alleges, at several points between 1992 and 1998, Hospital administration and/or these Committees of plaintiff's peers directed that the "standard orders" not be followed by the nursing staff and/or that Dr. Feyz stop writing these orders (further described below) (Complaint, ¶¶ 23-25, 30-31, 29-34, Apx 37a, 39a-40a)

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-3485
(313) 965-7900

Plaintiff alleged that he responded to this action by Hospital Administration by writing in patient charts in those cases in which his "standard Orderd A-D" were not followed by nursing staff and in which there were "potential medication errors," orders directing that "incident reports" be prepared "for that patient." Plaintiff also "wrote further orders," again in patient charts, that the cases in which his "standard order" was not complied with by the nursing staff be referred to the Quality Assurance Committee and to the Hospital President for investigation (Complaint, ¶¶ 26, 29, Apx 38a-39a).

Plaintiff's efforts to convince peer review committees, including the Utilization Review Committee and Medical Staff Quality Assurance Committee, proved unsuccessful in persuading his peers and those Committees that his "Standard Orders A-D" were medically appropriate (Complaint, ¶ 30-34, Apx 39a-40a).

As a consequence, plaintiff retaliated by "expanding" his standard "Orders A-D" to include inflammatory "supplementary orders" that he again placed in patient medical records. These "supplementary orders" in patient medical records declared that the orders were being made by Dr. Feyz to "prevent serious medication errors in the past." These orders directed that Hospital President Richard Hiltz should be contacted, and that such contact should be recorded in the medical records, if Dr. Feyz's orders were not carried out (Complaint, ¶ 37-38, Apx 41a).

Dr. Feyz in his complaint also complained of an additional dispute arising in 1997 with regard to hospital policy for signing orders that included information provided by nursing staff regarding patient allergies. Dr. Feyz believed this hospital policy to be ill-advised and refused to comply with the policy, thus refusing to complete patient medical records (Complaint, ¶¶ 49-44, Apx 33a).

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485
(313) 965-7900

According to plaintiff's complaint, peer review disciplinary proceedings were initiated against him and scheduled to be held before the Medical Staff Executive Committee based upon plaintiff's failure to complete medical records, as well as his "home medication error" orders (that is, his "standardized" order--"Orders A-D", and "supplemental" standing orders) (Complaint, ¶¶ 39-50, Apx 41a-43a). Specifically, plaintiff alleged that in 1998 there was a request by the Hospital President, Mr. Richard Hiltz, to Dr. Miller, the Chairman of the Executive Committee of the Medical Staff "that the Medical Staff Executive Committee commence a formal investigation into numerous charges" against Dr. Feyz (Complaint, ¶ 52, Apx 44a.)

The Medical Executive Committee in turn appointed an Ad Hoc Committee (consisting of defendants Drs. Kalenkiewicz, Newburn and Songco), to conduct an investigation for the Executive Committee (Complaint, ¶ 54, Apx 44a). Plaintiff alleged that the Ad Hoc Committee issued its findings to the Medical Staff Executive Committee by letter of September 21, 1998. Plaintiff alleged that on September 22, 1998, the Board placed plaintiff on probation, on which he remained until February 1, 1999 (Complaint, ¶¶ 61, 68, Apx 45a1-45a2).

According to plaintiff, also on September 21, 1998, the Executive Committee, relying in part on the Ad Hoc Committee's report, referred plaintiff to the Michigan Heath Professional Recovery Program ("HPRP") of the Michigan State Licensing Board as a possibly impaired physician (Complaint, ¶ 57, Apx 45a). The HPRP is a confidential program for monitoring health professionals who have impairments, including mental illness and substance abuse. MCL 333.16223.

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MICHIGAN 48226-5485
(313) 965-7900

Under Michigan's health professional licensure laws, health professionals are statutorily required to report another health professional if they have "reasonable cause

to believe" he or she has an impairment, including mental illness or substance abuse. MCL 333.16223. Health professionals who report suspected impaired health professionals to the HPRP are presumed to do so in good faith, and have complete immunity for referrals made in good faith pursuant to MCL 333.16244 (1). Plaintiff did submit to a psychiatric examination, and alleged that he ultimately was deemed unimpaired. (Complaint, ¶ 59, Apx 45a).

Plaintiff also alleged that he was incorrectly accused of abusing the pharmacy consult services by inappropriate overuse in "referring virtually all his admitted patients for a pharmacy consult" (Complaint, ¶¶ 75-77, Apx 46a). He alleged that the Executive Committee improperly limited availability of pharmacy consults to all staff within the hospital (first to 7:00 am to 10:00 pm daily, and then by eliminating weekend and holiday service). Dr. Feyz claimed these cutbacks were implemented without following the procedures in the bylaws and hospital policies (Complaint, ¶¶ 76, 84, 86, Apx 46a-47a). In retaliation, Dr. Feyz resorted to again writing his "Orders A-D and the order referring to Hiltz in order to assure quality patient care" (Complaint, ¶ 88, Apx 48a).

Finally, plaintiff alleged that further disciplinary proceedings were conducted in 2000 by the Executive Committee, but that these proceedings were not procedurally in compliance with the Medical Staff Bylaws (Complaint, ¶¶ 88-97, Apx 48a-50a). As a result of these proceedings, plaintiff alleged he was placed on indefinite probation. Plaintiff is no longer permitted to use the pharmacy consult, and has been advised that if he writes his "Orders A-D" or "related orders," he will be subject to summary suspension and/or revocation of his hospital privileges (Complaint, ¶¶ 98-100, Apx 50a).

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485
(313) 965-7900

While placed on "probation, it is undisputed that plaintiff continues to practice, and retained hospital privileges uninterrupted (plaintiff's Court of Appeals brief, pp 6, 25).

Plaintiff's Legal Theories

Plaintiff's complaint asserted seven counts or theories. In Count I, II and III, plaintiff claimed to have been discriminated against because of a disability in violation of the Michigan Persons With Disabilities Civil Rights Act, MCL 37.1101, the Americans with Disabilities Act, 42 USC 12101, and the Rehabilitation Act, 29 USC 794. Plaintiff claimed to be a person with a disability under all three Acts because he had been regarded as having a disability, a mental impairment (although he denies he in fact is impaired). Plaintiff claimed to have been discriminated against in violation of all three Acts because of that perceived disability, through the peer review disciplinary proceedings and actions, and the Michigan Health Professional Recovery Program referral. (Complaint, ¶¶ 102-122, Apx 51a).

In Count IV, plaintiff alleged against this private hospital and private individuals a deprivation of his federal and constitutional rights under 42 USC 1983 and/or 1985. (Complaint, ¶¶ 123-127, Apx 55a).

In Count V, plaintiff alleged a violation of privacy in having been subjected to examination by a mental health care provider under the Michigan Heath Professional Recovery Program ("HPRP") process. (Complaint, ¶¶ 128-135, Apx 56a-57a).

In Count VI, plaintiff alleged "Breach of Fiduciary And Public Duties." (Complaint, ¶¶ 136-154, Apx 57a-60a).

Finally, in Count VII, plaintiff made a brief and conclusory allegation of breach of contract. This was premised simply on the assertion that the medical staff bylaws are a

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MICHIGAN 48226-5485
(313) 965-7900

contract, and that the bylaws were "repeatedly breach[ed]" by the Hospital and Medical Staff "by ignoring procedural requirements and otherwise violating the By-Laws." (Complaint, ¶¶ 155-157, Apx 60a-61a).

Motion For Summary Disposition And Trial Court Ruling

Defendants moved for summary disposition pursuant to MCR 2.116(C)(8) on several grounds.

The trial court, however, granted summary disposition on December 27, 2002 on only two of those grounds and did not rule on the others. The trial court concluded that each of plaintiff's claims arose out of activity involving a peer/professional review committee and that summary disposition was proper due to the Michigan Peer Review Statute's grant of immunity to hospitals acting as a review entity in MCL 331.533. The court further concluded that plaintiff's claims were barred by Michigan's doctrine prohibiting judicial review of hospital staffing decisions. (Order and memorandum of law, Apx 4a).

Court Of Appeals' Decision—Majority Opinion

Plaintiff appealed to the Court of Appeals. Defendants filed a cross appeal in order to assert as alternative grounds supporting the grant of summary disposition the grounds raised by defendants' motion but not addressed by the trial court. This included defendants' immunity for referral of suspected impaired health professionals to the HPRP.

On January 13, 2005, the Court of Appeals released a published opinion reversing the trial court in nearly every aspect of its decision (Apx 10a). In an opinion by Judge Sawyer, in which Judge Smolenski concurred, the majority first concluded that even if all of plaintiff's claims arose out of the actions of a peer review committee, the

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485
(313) 965-7900

immunity provisions of MCL 331.531 do not grant immunity for actions which violate a civil rights act. The majority so concluded for two reasons:

> We base this determination on two reasons. First, the peer review statute only grants immunity for "an act or omission within [the peer review committee's] scope as a review entity." MCL 331.531 (3)(b). It is not within the scope of a peer review committee to violate someone's civil rights.
>
> * * *
>
> Which brings us to the second reason, namely that we view a violation of a civil rights act as being a malicious act.
>
> * * *
>
> The various civil rights acts adopted by the state Legislature and the United States Congress establishes the legal rights of the citizens, including plaintiff. If defendants acted in disregard of those rights, doing so represents a malicious act and, therefore, is outside the scope of immunity granted by the peer review statute. [Apx 12a]

The majority thus concluded that because the mere allegation of a civil rights violation falls outside of the scope of immunity granted by MCL 331.531, summary disposition should not have been granted on the basis of the statutory immunity under MCR 2.116(C)(8) with respect to counts I through IV of plaintiff's complaint (Apx 13a). The majority further ignored the definition of malice previously endorsed by the Court in this context in Regualos v Community Hospital, 140 Mich App 455, 463; 364 NW2d 723 (1985), and Veldhuis v Allan, 164 Mich App 131, 136-137; 416 NW2d 347 (1987).

The Court of Appeals majority then concluded that summary disposition based on peer review immunity under MCL 331.531 was appropriate only as to members of the Ad Hoc Committee under Count V of the complaint, alleging a common law invasion of privacy claim by virtue of the referral to the HPRP. The majority agreed with defendants that there were no specific allegations that the referral was maliciously made. (Apx 13a-15a).

The majority, however, further found that the peer review immunity provision did not apply to the Executive Committee of the Medical Staff because plaintiff "disputes

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MICHIGAN 48226-5485
(313) 965-7900

that the Executive Committee has been 'duly appointed' as a peer review committee" and, according to the majority, "defendants did not argue" that that the Executive Committee was a peer review committee. (Apx 14a). (As set forth in the argument below, this statement is inexplicable--defendants have consistently argued that all defendants were protected by peer review immunity.)

The Court of Appeals majority then turned to Michigan's common law doctrine of non-reviewability of staffing decisions by private hospitals. The majority concluded that, contrary to more than a dozen published and unpublished decisions since 1982, the doctrine should not be applied to the tort claim (invasion of privacy) or breach of contract claim (based on the bylaws) in this case. The majority held the non-review doctrine should apply only to count VI, "breach of fiduciary and public duties", which the Court characterized as seeking to impose duties on a hospital broader than those imposed on other corporations. (Apx 23a).

The majority examined the basis of the judicial non-review doctrine, first recognized in Michigan in Hoffman v Garden City Hospital-Osteopathic, 115 Mich App 773; 321 NW2d 810 (1982). The Court concluded that the doctrine had been improperly expanded by Michigan courts as part of a "jurisprudential drift" from the "core holding" of the decisions in other jurisdictions which were cited by the Court in Hoffman in first developing this rule (Apx 20a). The Court of Appeals majority held that Hoffman and its progeny were incorrect, and that the doctrine should be restated in terms of "the modest proposition that a private hospital is subject only to the legal obligations of a private entity, not the greater scrutiny of a public institution." (Apx 23a).

The majority noted that of this long line of decisions, only Long v Chelsea Community Hospital, 219 Mich App 578; 557 NW2d 157 (1996), was actually binding

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485
(313) 965-7900

precedent (having been published after November 1, 1990). However, because Long did not address the issue of whether the judicial non-review doctrine barred common law tort claims, the Court of Appeals majority felt free to disregard prior decisions so holding. (Apx 23a-24a).

The Court of Appeals majority then concluded that the contract claim in this case was not subject to the holding in Long that contract claims were subject to the judicial non-review doctrine for reasons not entirely clear from the majority opinion. The majority reasoned:

> Finally, as for count VII (breach of contract based on a violation of by-laws), it is unclear whether Long would control. Long did not directly address this issue, concluding that the breach of by-laws claim was not adequately pled. But the Long Court did state that a breach of contract or breach of by-laws claim is potentially viable if it does not violate the non-reviewability doctrine. As we discussed above, in our view, breach of contract and breach of by-laws claims do not violate the doctrine unless they seek to impose greater liability upon a private hospital than what another private employer would be subject to under the law. [Apx 24a]

The majority then declared that summary disposition of this count could only be granted if the trial court on remand determined that a breach of contract claim could not be based on a corporation's violation of its own by-laws under Michigan law. (Id.)

Court Of Appeals' Decision--Opinion By Judge Murray

With respect to peer review immunity, Judge Murray in his concurring and dissenting opinion did agree with the majority that "an unlawful act of discrimination constitutes malice." He disagreed that "an unlawful discriminatory act is not within the scope of a peer review committee." (Apx 25a) Judge Murray concluded that the majority erroneously ignored the definition of malice applied by the Court of Appeals in applying MCL 331.531 in Regualos v Community Hospital, 140 Mich App 455, 463; 364 NW2d 723 (1985) and Veldhuis v Allan, 164 Mich App 131, 136-137; 416 NW2d 347

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-3485
(313) 965-7900

(1987). Judge Murray concluded that plaintiff's allegations that defendants referred him to the Health Professional Recovery Program with full knowledge that he had no mental or physical limitations did fit within that definition of malice as articulated in Veldhuis. (Apx 27a).

Judge Murray in his concurring and dissenting opinion also concluded that it was beyond peradventure that the Executive Committee of the Medical Staff was a peer review committee:

> There can be no dispute that the "Executive Committee" which oversees the medical staff and makes all decisions regarding the discipline of medical staff members is a review entity as defined by the statute. MCL 331.531 (2)(a) and (b). Additionally, the by-laws grant the Executive Committee the authority to create a "special committee," such as the Ad Hoc Committee to investigate matters submitted to the Executive Committee.
>
> Because the Executive Committee was a review entity, its decisions are immune unless done with malice. [Apx 26a]

With regard to the judicial nonreview doctrine, Judge Murray pointed out that the majority's analysis was not complete in that it ignored that a significant basis for the doctrine was not just the difference between public and private hospitals. Rather, the doctrine also rested on the "court's policy choice to refrain from intervening in an area where it had no expertise, and hospital officials had all the experience, duties, and incentives to ensure a qualified medical staff." Judge Murray noted that Michigan courts had consistently rejected requests to review private hospital decisions on physician staffing issues even when the challenges were brought on contract and contractually related tort claims. (Feyz, opinion by Murray, pp 4-5.)

Declaring that he would affirm the dismissal of plaintiff 's tort and contract claims pursuant to the binding holding of Long and in deference to pre-1990 decisions under principles of stare decisis, Judge Murray reasoned:

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MICHIGAN 48226-3485
(313) 965-7900

In my view, the majority cannot reach the conclusions that it has without reversing Sarin [v Samaritan Health Center, 176 Mich App 790; 440 NW2d 80 (1989)], and ignoring some aspects of Long. The Long Court specifically held that the non-reviewability doctrine applies "to disputes that are contractual in nature," Long, supra, 586, and that the breach of contract and promissory estoppel claims brought in that case would not be reviewed under that doctrine. Id. at 587-588. What the Court could not conclude, because of insufficient evidence, was whether the facts of the case might fall within the exception to the doctrine. Id. at 588. Thus, it is quite clear that Long does preclude breach of contract claims in cases such as this and that Sarin bars tort claims that are "contractual in nature" and that challenge the hospital's staffing decision. Long, supra, n 4; Sarin, supra, at 791-792. Hence, without overruling Sarin and parts of Long (which cannot be done under MCR 7.215(J)(i)), the majority cannot reach the legal conclusions that it has reached today. [Apx 31a]

Defendants now appeal to this Court by leave granted.

Kitch Drutchas
Wagner Valitutti &
Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE,
SUITE 2400
DETROIT, MICHIGAN
48226-5485

(313) 965-7900

SUMMARY OF ARGUMENT

The Court of Appeals majority's decision eviscerating the judicial non-review doctrine is clear error, and will (and already has) adversely affect hospital peer review in Michigan. The holding here in Feyz violates binding precedent in Long v Chelsea Community Hospital, 219 Mich App 578; 557 NW2d 157 (1996), and thus is unlawful under MCR 7.215(J). It disregards long-established Michigan case law and principles of stare decisis. It is fundamentally inconsistent with public policy and Michigan's statutory peer review and patient confidentiality protections.

Since 1982 in Hoffman v Garden City Hospital-Osteopathic, 115 Mich App 773; 321 NW2d 810 (1982), in more than a dozen published and unpublished decisions, the Court of Appeals and federal courts applying Michigan law consistently have held that the courts will not interfere with staffing decisions at private hospitals in Michigan through common law contract or tort claims, and that these hospitals have the power to appoint and remove staff members without judicial supervision.

In Long v Chelsea Community Hospital, 219 Mich App 578; 557 NW2d 157 (1996), in an opinion by Judge, now Justice, Corrigan, concurred in by Judge, now Justice, Young, the Court re-embraced the nonreviewability doctrine. The Court squarely held it applicable to bar a physician's common law contract claim arising out of the termination of his medical staff privileges by the hospital. As urged by Judge Murray in dissent, the majority's unintelligible efforts here to distinguish Long in the course of reinstating Dr. Feyz's contract and tort claims utterly fails: the majority's decision is in direct violation of MCR 7.215(J). The Court should reaffirm the continuing viability of the judicial nonreview doctrine and its applicability to common law tort and contract claims against Michigan's hospitals and medical staff.

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MICHIGAN 48226-5485
(313) 965-7900

The Court of Appeals has also committed clear error in re-defining malice under the peer review immunity statute, and then creating a "per se" rule that all civil rights claims necessarily entail "malice" so as to eliminate peer review immunity, MCL 331.531. The majority's first rationale in support of its per se rule--that discrimination claims necessarily involve actions outside of the "scope" of a peer review committee--is patently wrong for the reasons offered by Judge Murray in dissent. By declaring the "scope of a peer review committee" cannot include an action contrary to law, the majority has made immunity never applicable and thus totally meaningless. The second rationale of the majority in holding immunity inapplicable (with which Judge Murray agreed)--that discrimination/civil rights claims necessarily involve malice--is a blanket, patently wrong, statement of the law regarding the elements of such claims which do not necessarily involve intentional discrimination.

Further, the Court of Appeals majority also clearly erred in refusing to apply peer review immunity to the common law claims against the Medical Staff Executive Committee based on the mistaken and inexplicable statement that defendants had not "argued" that the medical staff executive committee constituted a peer review committee. This record is clear that defendants "argued," and that indeed and in fact the very allegations in plaintiff's own complaint establishes, that the hospital's Medical Staff Executive Committee is a peer review committee under MCL 331.531.

Finally, the Court of Appeals clearly erred in failing to consider defendants' argument on cross appeal that plaintiffs' tort and civil rights claims against the Executive Committee and other defendants premised on the HPRP referral are not reviewable due to defendants' immunity from liability pursuant to MCL 333.16244 (1) for reporting plaintiff to the Health Professional Recovery Program.

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MICHIGAN 48226-5485
(313) 965-7900

The decision of the Court of Appeals majority has had and will have a devastating and chilling impact on the medical peer review and credentialing process and ultimately the quality of patient care in Michigan's hospitals. In eviscerating nearly a quarter century of established precedent, two judges of the Court of Appeals have exposed participants in the medical staff credentialing and peer review process at all of Michigan's hospitals to contract and tort claims, and to all civil rights claims, irrespective of the defendants' subjective good faith and lack of actual malice. This Court should reinstate the order of dismissal entered by the trial court.

Kitch Drutchas
Wagner Valitutti &
Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE,
SUITE 2400
DETROIT, MICHIGAN
48226-5485

(313) 965-7900

STANDARD OF REVIEW

A trial court's grant of summary disposition pursuant to MCR 2.116(C)(8) is reviewed de novo. Wickens v Oakwood Healthcare System, 465 Mich 53, 59; 631 NW2d 686 (2001).

ARGUMENT

I

THE MICHIGAN COURT OF APPEALS MAJORITY ERRED IN DEFYING MCR 7.215(J)(1), STARE DECISIS, AND COMPELLING PUBLIC POLICY CONSIDERATIONS WHEN IT IGNORED LONGSTANDING, UNWAVERING PRECEDENT THAT CONTRACT AND RELATED TORT CLAIMS THAT REQUIRE COURTS TO INQUIRE INTO A HOSPITAL'S MEDICAL STAFFING DECISIONS ARE NOT SUBJECT TO JUDICIAL REVIEW.

The Court of Appeals majority has eviscerated the doctrine of judicial nonreview of a private hospital's staffing decisions first recognized in Hoffman v Garden City Hospital, 115 Mich App 773; 321 NW2d 810 (1982), and followed in Long v Chelsea Community Hospital, 219 Mich App 578; 557 NW2d 157 (1996). In ignoring the compelling policy principles upon which the doctrine was and is based, as well as prior holdings of the Court of Appeals, the majority has clearly erred. This Court should now intervene and reinstate the longstanding doctrine of judicial nonreview.

A. The Court Of Appeals Majority's Decision Rejecting The Judicial Non-Review Doctrine Is In Direct Violation Of Long Established Michigan Case Law, And Violates Both MCR 7.215(J) And Principles Of Stare Decisis.

The Michigan Court of Appeals and Sixth Circuit Court of Appeals since 1982 in more than a dozen published and unpublished decisions consistently have decided as a matter of policy that the courts will not interfere with staffing decisions at private hospitals in Michigan through common law contract or tort claims, and that these

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485
(313) 965-7900

hospitals have the power to appoint and remove staff members without judicial supervision.[2]

---

[2] Hoffman v Garden City Hospital-Osteopathic, 115 Mich App 773; 321 NW2d 810 (1982), Regualos v Community Hospital, 140 Mich App 455; 364 NW2d 723 (1985) (suit by physician challenging the denial of his request for privileges for interpreting pulmonary function tests involved a decision of the governing body of a private hospital and not subject to review under Hoffman), Dutka v Sinai Hospital of Detroit, 143 Mich App 170; 371 NW2d 901 (1985) (physician's suit against hospital alleging breach of implied contract with respect to the denial of his staff privileges was dismissed on the ground that a decision of a private hospital regarding staff privileges is not a proper matter for judicial intervention), Veldhuis v Central Michigan Community Hospital, 142 Mich App 243; 369 NW2d 478 (1985) (hospital's decision to suspend plaintiff's staff privileges pursuant to a recommendation of the hospital's medical executive committee based on audits which found substandard care not subject to judicial review by the court, as Hoffman precludes review of both the private hospital's decision on staff privileges and the method by which the hospital personnel reached that decision), Bhogoanker v Metropolitan Hospital, 164 Mich App 563; 417 NW2d 501 (1987) (plaintiff physician's complaint alleging breach of contract, estoppel, breach of convenant of good faith and fair dealing, negligence, and lack of adequate notice arising out of termination of his staff privileges because of a reduction of staff properly dismissed because, although "plaintiff alleged breach of contract in this case, it is clear beyond peradventure that plaintiff is actually seeking judicial intervention into a decision of a hospital to terminate his employment as a physician" which is not subject to review under the Hoffman doctrine), Sarin v Samaritan Health Center, 176 Mich App 790; 440 NW2d 80 (1989) (plaintiff physician's claim of breach of contract, tortious interference with contract, and tortious interference with an advantageous business relationship against hospital and physicians who allegedly wrongfully terminated his medical staff privileges subject to the judicial non-review doctrine because consideration of those claims "would necessarily involve a review of the decision to terminate and the methods or reasons behind that decision, thus making a mockery of the rule that prohibits judicial review of such decisions by private hospitals"), Muzquiz v WA Foote Memorial Hospital, 70 F3d 422 (CA 6, 1995) (physician's breach of contract claim against a hospital for violation of credentialing procedures outlined in the bylaws resulting in limitation of physician's privileges barred on the basis that Michigan law prohibits judicial review of staffing decisions by private hospitals), Long v Chelsea Community Hospital, 219 Mich App 578; 557 NW2d 157 (1996) (physician's claim against the hospital challenging his termination from the staff of the hospital on theories of breach of contract and promissory estoppel properly dismissed because a private hospital is empowered to appoint and remove its members at will without judicial intervention with respect that disputes that are contractual in nature), Macomb Hospital Center Medical Staff v Detroit-Macomb Hospital Corp, unpublished opinion per curiam of the Court of Appeals, decided 12/20/96 (docket no 182394) (claim by physician and medical staff of a breach of contract by the hospital in unilaterally amending the medical staff bylaws and in replacing the Executive Committee properly subject to summary disposition as a private

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MICHIGAN 48226-5485
(313) 965-7900

The doctrine was first embraced in Hoffman v Garden City Hospital, 115 Mich App 773; 321 NS2d 8100 (1982). In Hoffman physicians who had unsuccessfully applied for staff privileges at a private hospital sued. They alleged that the decision was arbitrary, capricious and unreasonable in that it was the fulfillment of a conspiracy to

---

hospital's decisions regarding staff privileges is not reviewable), Sorensen v Sparrow Hospital and Health System, unpublished opinion per curiam of the Court of Appeals, decided 11/7/97 (docket no 186702) (summary disposition properly granted as to physician's tort and contract claims against the hospital and its staff "because those claims could not be reviewed 'without intervening in the hospital's decisions and interfering with the peer review process' Sarin, supra at 795"), Samuel v Herrick Memorial Hospital, 201 F3d 830 (CA 6, 2000) (the district court "was without jurisdiction to review plaintiff's claim of tortious interference with contractual relations and business relationships, as are we, because it would necessarily involve a review of the decision to suspend plaintiff and the methods or reasons behind that action, which is clearly prohibited under Michigan law as improper interference with the hospital's decisions and the peer review process"), Verma v Giancarlo, unpublished opinion per curiam of the Court of Appeals, decided 12/12/00 (docket no 208534) (one physician's claims of civil conspiracy and tortious interference with advantageous business relations against another physician based on his allegedly interfering with the first physician's attainment of staff privileges properly dismissed under the Hoffman non-review doctrine), Holloman v London, unpublished opinion per curiam of the Court of Appeals, decided 2/22/02 (docket no 227422) (physician's suit against hospital for breach of contract and tortious interference which would necessarily invoke a review of the hospital's staffing decision was "barred because it would "intervene in the hospital's decisions and would interfere with the peer review process"), Abu-Farha v Providence Hospital, unpublished opinion per curiam of the Court of Appeals, decided 6/14/02 (docket no 229279) (breach of contract and intentional infliction of emotional distress claims by resident based on termination from first year residency program at the defendant hospital barred by the non-review doctrine because "certainly supervising doctors who oversee the training programs in hospitals have the right to evaluate the residents, make decisions about their performance and determine whether they should be permitted to continue without judicial intervention"), Savas v William Beaumont Hospital, 216 F Supp 2d 660 (ED Mich 2002) (summary judgment granted to the hospital on the ground that tort claims for tortious interference with advantageous business relationship and intentional infliction of emotional distress could not be reviewed because to do so necessarily would involve a review of the hospital's decision regarding the plaintiff's staff privileges), Al-Hadidi v Stevens, unpublished memorandum opinion of the Court of Appeals, decided 7/26/02 (docket no 229451) (affirming dismissal of physicians' lawsuit against Beaumont Hospital and other defendants where the trial court properly relied on the principle of non-reviewability of private hospitals' staffing decisions set forth in Hoffman, supra), Ravikant v William Beaumont Hospital, unpublished opinion per curiam of the Court of Appeals, decided 9/30/03 (docket no 238911) (physician's claim of estoppel arising out of the hospital's restriction of plaintiff's staff privileges properly dismissed based on the doctrine of judicial non-review of private hospital staffing decisions).

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MICHIGAN 48226-5485
(313) 965-7900

protect the financial interests of the individual staff member, as well as a statutory antitrust claim. Plaintiffs argued that the hospital's decisions on staff privileges should be subject to judicial review in order to protect the public.

The Court of Appeals in Hoffman disagreed, holding that a private hospital has the power to appoint and remove members at will without judicial intervention. The Court found persuasive the reasoning of Shulman v Washington Hospital Center, 222 F Supp 59 (DDC 1963), remanded with instructions 348 F2d 70 (1965), aff'd on remand, 319 F Supp 252 (DDC 1970). As noted by Judge Murray in his dissent here in Feyz, the rationale underlying Shulman was two-fold. The first was that a private hospital's decision was not subject to the same constitutional due process constraints as those of a public hospital. The second was that courts are ill-equipped to decide medical staffing questions. (Apx, 28a).

It is this second rationale, and the hospitals' special expertise in peer review and quality of care decisions involving medical care and medical staff, that has since been echoed in decision after decision by Courts in applying Michigan law. In Sarin v Samaritan Health Center, supra, the defendant, a private hospital, denied the plaintiff physician medical staff privileges. Plaintiff asserted a breach of contract as well as tortious interference claims against individual physician defendants who he claimed conspired to induce the hospital to breach his contract and tortiously interfere with his advantageous business relationships.

The Court of Appeals in Sarin, in affirming the trial court's grant of summary disposition, held that any claim that the bylaws were violated necessarily required an impermissible review of the decisions and/or process by which the decision was rendered to deny privileges. The Court stated:

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485
(313) 965-7900

> Although plaintiff contends that he is not asking for review of whether there was a violation of due process or fair procedure, we believe consideration of his breach of contract claim would necessarily involve a review of the decision to terminate and the methods or reasons behind that decision, thus making a mockery of the rule that prohibits judicial review of such decisions by private hospitals.
>
> * * *In any event, we also agree with the trial court's determination that it lacked subject matter jurisdiction in this case. Although plaintiff alleged breach of contract in this case, it is clear beyond peradventure that plaintiff is actually seeking judicial intervention into a decision of a hospital to terminate his employment as a physician due to economic necessity. Such a decision is not subject to review by the circuit court.
>
> While there may be some situations where a court should be able to consider a hospital's action without violating the principle of nonreviewability, this case is not of that sort. Plaintiff's various claims revolve around questions regarding who the hospital review proceedings advanced, the composition of the board, its sources of information, claimed inaccurate information, and the actual decision to suspend and terminate his privileges. Moreover, plaintiff's tort claims are based on alleged violations of the bylaws. Thus, we believe the trial court properly concluded that it could not review plaintiff's claims without intervening in the hospital's decision and interfering with the peer review process. In so ruling, we repeat our adherence to and support of the rule that prohibits judicial review of the action of a private hospital in denying staff privileges to a doctor. [Sarin, 769.]

In its most recent published and, under MCR 7.215(J)(1), precedentially binding pronouncement in Long v Chelsea Community Hospital, 219 Mich App 578; 557 NW2d 157 (1996), the Court squarely held that the judicial nonreview doctrine applies to a physician's contract claims arising out of a private hospital's medical staff decisions. The majority's opinion in this matter is in direct contravention to the holding of the Court in Long v Chelsea Community Hospital, an opinion authored by Judge, now Justice Corrigan, and concurred in by Judge, now Justice Young.

In Long, the plaintiff physician brought suit against Chelsea Community Hospital and individual physicians alleging breach of contract and promissory estoppel with regard to the termination of his staff privileges at the hospital. The Court in this

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485
(313) 965-7900

published decision held that these common law claims were subject to and barred by the judicial nonreview doctrine:

> Additionally, plaintiff states that defendants had a binding contractual obligation to hold a hearing and to find that plaintiff was incompetent before terminating his employment. * * * Courts may not review a private hospital's staffing decisions. Sarin v Samaritan Health Center, 176 Mich App 790, 795; 440 NW2d 80 (1989); Regualos, supra at 461; Hoffman v Garden City Hosp, 115 Mich App 773; 321 NW2d 810 (1982); Muzquiz v W A Foote Memorial Hosp, Inc, 70 F3d 422, 430 (CA 6, 1995). A private hospital is empowered to appoint and remove its members at will without judicial intervention. Sarin, supra at 792-793; Hoffman, supra at 778. A private hospital has the right to exclude any doctor from practicing within it. Hoffman, supra at 778-779.
>
> The above law is limited to disputes that are contractual in nature. * * * Had plaintiff in this case asserted that defendants violated state or federal law, we may have chosen to review his claim. In this case, however, plaintiff did not assert a violation of civil rights or a violation of a state statute. * * *
>
> Plaintiff further argues that his claim is not a constitutional due process argument, but rather is based on a breach of defendants' bylaws, and thus this Court should review it. Plaintiff's claim on this issue fails in light of Sarin. A breach of contract and breach of bylaws claim would necessarily invoke a review of the hospital's decision to terminate its employees. Sarin, supra at 794. * * * [Long, supra,586-588.]

The Court of Appeals majority clearly erred in concluding that Long was not binding precedent as to the validity of Dr. Feyz's breach of contract claim here. First, Dr. Feyz's breach of contract claim clearly alleges nothing more or different than did the plaintiff in Long. Dr. Feyz's entire contract count is that:

> 155. The Medical Staff By-Laws are a contract under which members of the Medical Staff exercise staff privileges at Mercy.
>
> 156. Defendants Mercy and the Medical Staff have repeatedly breached and continue to breach that contract by ignoring procedural requirements and otherwise violating the by-laws. [Complaint, ¶¶ 155-156, Apx 60a-61a]

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MICHIGAN 48226-5485
(313) 965-7900

The majority's tortured analysis in attempting to evade Long simply makes no sense:

> Finally, as for Count VII (breach of contract based upon a violation of hospital by-laws), it is unclear whether Long would control. Long did not directly address this issue, concluding that the breach of by-laws claim was not adequately pled. But the Long Court did state that a breach of contract or breach of by-laws claim is potentially viable if it does not violate the non-reviewability doctrine. As discussed above, in our view, breach of contract and breach of by-laws claims do not violate the doctrine unless they seek to impose greater liability upon a private hospital than what another private employer would be subject to under the law. The question whether Michigan law recognizes a breach of contract claim based upon the breach of corporate by-laws is not before us; therefore, we need not address that issue. Because the trial court broadly applied the non-reviewability doctrine to conclude that no breach of contract based upon a breach of by-laws could be maintained, the trial court erred in granting summary disposition on that basis. The trial court may consider summary disposition of this count on another basis, but we caution the trial court that it cannot be granted on the basis that private hospitals enjoy a special immunity as to such claims. Rather, private hospitals are subject to the same breach of contract claims as any other private corporation. Therefore, if the issue is again raised, the trial court must determine whether a breach of contract claim may be based upon a corporation's violation of its own by-laws under Michigan law. If the answer to that question is "yes," and if plaintiff has adequately pled such a claim, then it is viable despite the non-reviewability doctrine. But plaintiff's claim does not lack viability merely because the defendant is a private hospital rather than some other private corporation. [Feyz, majority opinion, pp 14-15, Apx 23a-24a]

As recognized by Judge Murray in his partial dissent, the Court of Appeals majority's attempt to distinguish this precedent is not successful:

> In my view, the majority cannot reach the conclusions that it has without reversing Sarin, and ignoring some aspects of Long. The Long Court specifically held that the nonreviewability doctrine applies "to disputes that are contractual in nature," Long, supra at 586, and that the breach of contract and promissory estoppel claims brought in that case would not be reviewed under that doctrine. Id. at 587-588. What the Court could not conclude, because of insufficient evidence, was whether the facts of that case might fall within the exception to the doctrine. Id. at 588. Thus, it is quite clear that Long does preclude breach of contract claims in cases such as this, and that Sarin bars tort claims that are "contractual in nature" and that challenge the hospital's staffing decision. Long, supra at 587 n 4;

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MICHIGAN 48226-5485
(313) 965-7900

> Sarin, supra at 791-792. Hence, without overruling Sarin and parts of Long (which cannot be done under MCR 7.215(J)(1)), the majority cannot reach the legal conclusions that it has reached today. [Feyz, opinion by Murray, p 7, Apx 31a]

Judge Murray was far more gracious than the majority's tortured analysis permits. The majority violated binding Michigan precedent in Long in reversing the trial court's dismissal of the contract claim, and violated longstanding authority to which deference should be given under stare decisis principles in reinstating the invasion of privacy tort claim.

The trial court below properly applied the rule prohibiting judicial review of a private hospital's staffing decisions to this case. There is no dispute that Mercy Memorial is a private hospital and the sum and substance of plaintiff's claims is that he was disciplined and placed on probation by defendants pursuant to the medical staff bylaws (complaint ¶48-70, 88-101, Apx 43a-46a, 48a-50a). Plaintiff's corrective action was a part of the hospital's statutorily mandated peer review process to ensure quality of care. MCL 331.351; MCL 333.21513. To prove his claims, plaintiff would necessarily have to probe into the hospital's decision and peer review process, which the courts have affirmatively said they are unwilling to do. As plaintiff impermissibly seeks to invade the peer review process by requesting judicial review of a hospital's medical staffing decision, this Court should reverse the Court of Appeals and affirm the judgment of the trial court declining to review plaintiff's claims.

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MICHIGAN 48226-5485
(313) 965-7900

B. The Judicial Nonreview Doctrine Should Be Reinstated By This Court As Consistent With And Compelled By Public Policy, And The Comprehensive Statutory Confidentiality Of Hospital Peer/Professional Review Proceedings And Patient Care In Michigan.

The Hoffman rule of judicial nonreview of claims premised on the staffing decisions of private hospitals is consistent with the Michigan Legislature's mandate that hospitals are responsible for staff selection and review of hospital staff in order to reduce morbidity and mortality and improve patient care within the hospital. MCL 333.21513 (a)-(d) (Apx 138a).

The Legislature in Article 17 of the Public Health Code, in section 21513 (MCL 333.21513), specifically delineates the review functions for which hospitals are responsible, providing in part, as follows:

> The owner, operator, and governing body of a hospital licensed under this Article:
>
> (a) are responsible for all phases of the operation of the hospital, selection of the medical staff, and the quality of care rendered in the hospital.
>
> (b) shall require that the physicians, dentists, and other personnel working in the hospital and for whom a license or registration is required to currently be licensed or registered.
>
> (c) shall assure that the physicians and dentists admitted to practice in the hospital are granted hospital privileges, consistent with their individual training, experience, and other qualifications.
>
> (d) shall assure that physicians admitted to practice in the hospital are organized into a medical staff to enable an effective review of the professional practices in the hospital for the purpose of reducing morbidity and mortality and improving the care provided in the hospital for patients. This review shall include the quality and necessity of the care provided and the preventability of complications and death occurring in the hospital. [Apx 138a]

It is consistent with and pursuant to this mandate--that hospitals ensure the quality of care rendered in the hospital and the competence and qualifications of

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MICHIGAN 48226-5485
(313) 965-7900

physicians on the medical staff through the peer review process--that the courts have taken a "hands off" posture with respect to attacks on such statutorily mandated staffing decisions. Courts are ill-equipped to judicially interfere with or second guess these quality of care decisions.

Contrary to the Court of Appeals majority's declaration, the nonreviewability doctrine had roots broader than merely a distinction between the applicability of due process safeguards to public and private hospitals. As recognized by Judge Murray in his partial dissent, the majority erred in concluding that the only basis for the nonreviewability doctrine more that two decades ago was a distinction between public and private hospitals.

> The majority's analysis of the underpinnings for the nonreviewability doctrine is not complete. It is certainly true that one of the issues decided by the foundational case of Shulman v Washington Hosp Ctr, 222 F Supp 59 (D DC, 1963) was that a private hospital's decision was not subject to the same constitutional prohibitions as a public hospital. However, the Shulman Court provided an additional rationale to support its holding that courts should refrain from reviewing staffing decisions of private hospitals, the rationale primarily being that courts are ill-equipped to decide such issues. [Feyz, opinion by Murray, p 4, Apx 28a, emphasis added.]

The additional rationale by the Court in Shulman, as Judge Murray noted in quoting Shulman as follows: "was also the court's policy choice to refrain from intervening in an area where it had no expertise, and hospital officials had all the experience, duties, and incentives to ensure a qualified medical staff:"

> "*There are sound reasons that lead the courts not to interfere in these matters. Judicial tribunals are not equipped to review the action of hospital authorities in selecting or refusing to appoint members of medical staffs, declining to renew appointments previously made, or excluding physicians or surgeons from hospital facilities.* The authorities of a hospital necessarily and naturally endeavor to their utmost to serve in the best possible manner the sick and the afflicted who knock at their door. Not all professional men, be they physicians, lawyers, or members of other professions, are of identical ability, competence, or experience, or of equal reliability, character, and standards of ethics. The mere fact that a person

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485
(313) 965-7900

> is admitted or licensed to practice his profession does not justify any inference beyond the conclusion that he has met the minimum requirements and possesses the minimum qualifications for that purpose. Necessarily hospitals endeavor to secure the most competent and experienced staff for their patients. Without regard to the absence of any legal liability, the hospital in admitting a physician or surgeon to its facilities extends a moral imprimatur to him in the eyes of the public. Moreover not all professional men have a personality that enables them to work in harmony with others, and to inspire confidence in their fellows and in patients. These factors are of importance and here, too, there is room for selection. *In matters such as these the courts are not in a position to substitute their judgment for that of professional groups.* [Shulman, supra at 64 (emphasis added in opinion by Judge Murray), Apx 28a]

Thus, it was not just the legal significance between a public and private hospital that drove the Shulman decision. It was also the court's policy choice to refrain from intervening in an area where it had no expertise, and hospital officials had all the experience, duties, and incentives to ensure a qualified medical staff.

The Hoffman rule of judicial nonreview of common law claims premised on the staffing decisions of private hospitals is also consistent with and compelled as a matter of policy by the comprehensive confidentiality imposed to facilitate the quality assurance and review process mandated by the Michigan Public Health Code in MCL 333.31513. That confidentiality is provided for in the peer review entity statute, MCL 331.533 (Apx 132a, 136a, 139a), and in the Public Health Code, in both MCL 333.20175(8) and MCL 333.21515.

MCL 333.20175(8) and MCL 333.21515 impose a complete bar on disclosure of data and information collected for or by individuals or committees assigned a professional review function. MCL 333.20175(8) provides that information collected for or by individuals or committees in a health facility assigned "a professional review function" is "confidential" and "not subject to court subpoena:"

> The records, data, and the knowledge collected for or by individuals or committees assigned a professional review function in a health facility or

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MICHIGAN 48226-5485
(313) 965-7900

> agency are confidential, shall be used only for the purposes provided in this article, are not public records, and are not subject to court subpoena. [MCL 333.20175(8)].

Section 21515 provides that information collected by hospitals in discharging a professional review function described in "this article" (Article 17 of the Public Health Code, which includes MCL 333.21513) "shall be used only for the purposes provided in this article" and "shall not be available for subpoena:"

> The records, data, and knowledge collected for or by individuals or committees assigned a review function described in this article [Article 17 of the Public Health Code, MCL 333.20101-MCL 333.22260] are confidential and shall be used only for the purposes provided in this article, shall not be public records, and shall not be available for court subpoena. [MCL 333.21515.]

The statutes governing peer review entities, MCL 331.531-533, and providing immunity for participants in the professional/peer review process unless they act with malice, MCL 331.531, are set forth separately from the Public Health Code. These too provide an absolute prohibition on disclosure of data and information collected, and the proceedings of a review entity, in any administrative or civil proceeding, MCL 331.533. (Apx 132a). MCL 333.533 provides that, except as otherwise provided in MCL 331.532 ("section two"), which provides for the release of information for peer review or research purposes:

> The record of a proceeding and the reports, findings and conclusions of a review entity and data collected for or by a review entity under this act are confidential, are not public records, and are not discoverable and shall not be used as evidence in a civil or administrative proceeding. [MCL 331.533.]

The prohibition on disclosure unequivocally applies to all civil or administrative proceedings. No exception is provided by the statute for actions brought by physicians (or anyone else), and Michigan Courts have consistently applied these protections to prohibit disclosure, Attorney General v Bruce, 422 Mich 157; 369 NW2d 826 (1985), In

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-3485
(313) 965-7900

re Investigation of Lieberman, 250 Mich App 381; 646 NW2d 199 (2002), Dye v St John Hospital, 230 Mich App 661; 584 NW2d 747 (1998).

In Dye, the Court of Appeals held that the peer review confidentiality provisions precluded disclosure in a medical malpractice action of a staff physician's credentialing file containing information regarding the credentialing and discipline processes referable to that physician. In In re Investigation of Lieberman, supra, the Court held that hospital peer review documents generated by a hospital on investigation of the death of a patient were confidential and not subject to disclosure even in a criminal investigation by the Attorney General. In Attorney General v Bruce this Court held that a hospital's investigation and discipline of a physician for the death of a patient was confidential and disclosure could not be compelled in connection with a licensing investigation on behalf of the State Board of Medicine.

In Dorris v Detroit Osteopathic Hospital Corporation, 460 Mich 26, 42-43; 594 NW2d 455 (1999), in examining the confidentiality of an incident report, this Court acknowledged the validity of the same hands-off policy underlying the peer review confidentiality provisions as underlies the judicial nonreview doctrine:

> Hospital personnel are expected to give their honest assessment and reviews of the performance of other hospital staff in incidents such as the one in the present case. Absent the assurance of confidentiality as provided by §§ 21515 and 20175(8), the willingness of hospital staff to provide their candid assessment will be greatly diminished. This will have a direct effect on the hospital's ability to monitor, investigate, and respond to trends and incidents that affect patient care, morbidity, and mortality.

These concerns, and the need to ensure candid assessment and operation of peer review and quality assurance committees, likewise justify continued respect of

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485
(313) 965-7900

and adherence to the judicial nonreview doctrine.[3]

Further implicated in many of these cases is patient confidentiality, and the potential for disclosure of patient information that would violate state and federal law. Here, for example, the dispute between the physician and the hospital involves allegations of the quality of medical care. This physician has alleged that the potential for medication errors by staff justified his "Orders A-D" and "supplementary orders." However, disclosure of patient information to third parties is prohibited by both state law, MCL 600.2157, Dorris v Detroit Osteopathic Hospital Corporation, 460 Mich 26; 594 NW2d 455 (1999), Saur v Probes, 190 Mich App 636; 476 NW2d 496 (1991), and federal law, 42 USC 1301 (Health Insurance Portability and Accountability Act of 1996--HIPAA), 45 CFR 164.508 (generally, a health care provider may not use or disclose protected health information without a valid authorization by the patient).

The same rationale underlying the peer review confidentiality and patient confidentiality provisions underlie and compel adherence to the judicial nonreview doctrine as applied to common law contract and tort claims.

Although the Court of Appeals majority relied upon cases from other jurisdictions rejecting the judicial nonreview doctrine, other jurisdictions in fact have taken a variety of approaches to the question of nonreviewability of hospital staffing decisions, with some jurisdictions holding there is no review permissible, and most allowing only very limited review to determine whether there was substantial procedural compliance with the bylaws and/or whether the staffing decision was arbitrary and capricious. See e.g., Exclusion Of, Or Discrimination Against, Physician Or Surgeon By Hospital, 28 ALR 5th

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MICHIGAN 48226-5485
(313) 965-7900

[2]These concerns often do not apply in federal courts which may not apply Michigan statutory confidentiality or evidentiary privilege limitations to federal claims. See e.g. Dorsten v Lapeer County General, 88 FRD 583 (ED Mich 1980).

107, Crag W. Dallon, Understanding Judicial Review of Hospitals' Physician Credentialing and Peer Review Decisions, 73 Temple L Rev 597 (2000) (also providing an informative discussion of cases in various jurisdictions, although advocating a position allowing judicial review that is inconsistent with that of Michigan). Decisions in other jurisdictions continuing to apply the same principles of nonreview as Michigan include Medcalf v Coleman, 71 P3d 53 (Okla Civ App, 2002), Winston v American Medical International, 930 SW2d 945 (Tex App, 1996), Grossling v Ford Memorial Hospital, 614 F Supp 1051 (ED Tex, 1985) (applying Texas law), Medical Center Hospitals v Terzis, 235 Va 443; 367 SE2d 728 (1988) following Khoury v Community Memorial Hospital, Inc, 203 Va 236; 123 SE2d 533 (1962) except as modified by statute.

The principles and policies underlying Michigan's statutory and common law deference to hospital peer review decisions and patient confidentiality set forth above, however, further compel the conclusion that no modification of Michigan's position of nonreview is in order, regardless of the divergent positions of other jurisdictions. To allow even limited review with regard to the procedures used in the hospital peer review process (as would appear to be the majority rule) would run afoul of these principles. Even limited review of procedures or the process would be inconsistent with and ultimately precluded in any event, by the directive in MCL 331.533 that "The record of a proceeding and the reports, findings and conclusions of a review entity and data collected for or by a review entity under this act are confidential, are not public records, and are not discoverable and shall not be used as evidence in a civil or administrative proceeding."

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485
(313) 965-7900

C. This Is Not Such A Case As Would Justify Creating An Exception To Michigan's Judicial Non-Review Doctrine.

While "there may be some situations where a court should be able to consider a hospital's actions without violating the principle of nonreviewability," Sarin, supra, 795, this clearly is not such a situation. Dr. Feyz's allegations in support of his common law tort and contract claims all directly relate to the hospital's quality assurance and peer review processes. Dr. Feyz's allegations would draw a circuit court and lay jury deeply, and unacceptably, into issues of patient care, peer review, and medical staffing decisions. Given Dr. Feyz's own allegations, this would include the appropriate scope of nursing practice, and validity of a single physician's attempt to redefine that scope, proper hours and terms of operation of a hospital pharmacy consult service, whether care of patients did or did not involve "serious medication errors in the past," and the deliberative processes of the Ad Hoc and Medical Executive Committees. As a matter of policy, Michigan law should continue to preclude judicial review of such claims.

Kitch Drutchas
Wagner Valitutti &
Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE,
SUITE 2400
DETROIT, MICHIGAN
48226-5485

(313) 965-7900

II

THE COURT OF APPEALS ERRED IN CREATING A "PER SE" RULE THAT ALL CIVIL RIGHTS CLAIMS NECESSARILY ENTAIL "MALICE" SO AS TO ELIMINATE PEER REVIEW IMMUNITY, MCL 331.531.

A. MCL 331.351 Provides Immunity For Actions Taken In Furtherance Of Peer Review.

As set forth in his complaint, plaintiff was disciplined and placed on probation by the Executive Committee of the Medical Staff of Mercy Memorial Hospital for his failure to cooperate with the Medical Staff, peer review committees of the medical staff, and Hospital staff and administration, and for his refusal to follow Hospital policy and procedures. Pursuant to the medical staff bylaws, the Executive Committee notified plaintiff of his probation and of behaviors that would result in immediate suspension and/or revocation of his hospital privileges. The Executive Committee's review of plaintiff's behavior and its recommended corrective action unquestionably were part of the peer review process as established by the allegations in plaintiff's own complaint.

As noted in Argument I above, recognizing the critical importance of effective peer review of the practices and qualifications of the health care professionals who provide medical care in this State, the Legislature has both mandated such professional review and provided safeguards of confidentiality and immunity to ensure effective discharge of that mandate. MCL 333.21513 (a)-(d) provides that the "owner, operator and governing body of a hospital licensed under" article 17 of the Public Health Code are responsible for all the selection of the medical staff and the quality of care rendered in the hospital. The Legislature has further imposed strict confidentiality protection on professional review information and proceedings in MCL 333.21515, MCL 333.20175(8), and MCL 331.533.

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MICHIGAN 48226-5485
(313) 965-7900

Immunity to participants in the peer review process is provided by MCL 331.531, the Michigan Peer Review statute, as follows:

> (1) A person, organization, or entity may provide to a review entity information or data relating to physical or psychological condition of a person, the necessity, appropriateness, or quality of health care rendered to a person, or the qualifications, competence, or performance of a health care provider.
>
> (2) As used in this section, "review entity" means 1 of the following:
>
> (a) A duly appointed peer review committee of 1 of the following:
>
> * * *
>
> (iii) A health facility or agency licensed under article 17 of the public health code, 1978 PA 368, MCL 333.20101 to 333.22260.
>
> (iv) A health care association.
>
> * * *
>
> (v) A health care network, a health care organization, or a health care delivery system composed of health professionals licensed under article 15 of the public health code, 1978 PA 368, MCL 333.16101 to 333.18838, or composed of health facilities licensed under article 17 of the public health code, 1978 PA 368, MCL 333.20101 to 333.22260, or both.
>
> * * *
>
> (3) A person, organization, or entity is not civilly or criminally liable:
>
> (a) For providing information or data pursuant to subsection (1).
>
> (b) For an act or communication within its scope as a review entity.
>
> (c) For releasing or publishing a record of the proceedings, or of the reports, findings, or conclusions of a review entity, subject to sections 2 and 3.
>
> (4) The immunity from liability provided under subsection (3) does not apply to a person, organization, or entity that acts with malice. [MCL 331.533.]

The Michigan Peer Review immunity protection differs from the immunity also provided to hospital peer review proceedings by the federal Health Care Quality Improvement Act (HCQIA), 42 USC 11111 et seq (Apx 140a-144a), in several

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MICHIGAN 48226-5485
(313) 965-7900

instructive respects. The latter specifically excepts from its application a claim for damages under any state or federal law "relating to the civil rights" of any person, 42 USC 11111(a) (1). The HCQIA only applies to specifically defined "professional review actions," 42 USC 11151(9), taken in accord with certain procedural standards, 42 USC 11112. The Michigan statute, in contrast, does not except civil rights actions from its grant of immunity, or require any procedures for its application. The Michigan statute, however, does not apply to "a person, organization, or entity that acts with malice." MCL 331.533 (4)

In Regualos v Community Hospital, 140 Mich App 455, 463; 364 NW2d 723 (1985), and Veldhuis v Allan, 164 Mich App 131, 136-137; 416 NW2d 347 (1987), the Court of Appeals adopted the defamation definition of malice to define the statutorily undefined "malice" found in MCL 331.531:

> We agree with defendant Davis Clinic that the definition of malice applicable in defamation actions also seems appropriate in the context of MCL 331.531; MSA 14.57(21). See Regualos v Community Hospital, 140 Mich App 455, 463; 364 NW2d 723 (1985), lv den 423 Mich 861 (1985), citing Lins v Evening News Ass'n, 129 Mich App 419; 342 NW2d 573 (1983. Applying that definition, the statutory immunity does not apply only if the person supplying information or data does so with the knowledge of its falsity or with reckless disregard of its truth or falsity. 129 Mich App 432. Similarly, a review entity is not immune from liability if it acts with knowledge of the falsity, or with reckless disregard of the truth or falsity, of information or data which it communicates or upon which it acts. [Id.]

Defendants submit that this definition of malice is appropriate, and that the factual allegations in the complaint fail to support an allegation of malice--of "knowledge of its falsity or with reckless disregard of its truth or falsity."

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485
(313) 965-7900

B. The Court Of Appeals Erred In Redefining "Malice", and Creating And Applying A Per Se Rule That Peer Review Immunity Can Never Apply To A Discrimination Claim.

The Court of Appeals majority holds that a discrimination claim is not barred by the statute's grant of immunity because (1) an unlawful discriminatory act is not "within the scope" of a peer review committee, and (2) an unlawful act of discrimination automatically constitutes "malice" as the majority redefines it. Judge Murray disagreed with the first conclusion and the majority's re-definition of malice. However, observing that "discrimination generally must be intentional to be actionable," Judge Murray agreed with the majority that "the immunity under MCL 331.531 would not otherwise bar valid discrimination claims."

The majority's first basis is clearly incorrect for the reasons urged by Judge Murray. By declaring that the "scope of a peer review committee" cannot include an act contrary to law, the majority has made immunity never applicable and thus totally meaningless:

> In determining whether an act or communication is within the scope of a review committee, we cannot examine the legal result of the act or communication; instead, we must focus on the subject matter on which the initial act or communication complained of was made, i.e., the decision not to retain a physician, to suspend a physician, etc. "Scope" in this context means "range of operation. Webster's New Collegiate Dictionary (1980). See, also, Backus v Kauffman, 238 Mich App 402, 409; 605 NW2d 690 (1999) (defining scope of authority in the context of the governmental immunity statute). Otherwise, every time there is a potential for legal liability, there would be no immunity, which would defeat the purposes of the statute. As a result, I disagree with that part of the majority's analysis of MCL 331.531 (3)(b). [Feyz, opinion by Murray, p 2, Apx 26a]

Further, the statute's immunity applies not just to peer review entities but as well as to any person or entity who provides information and data to a peer review entity.

Second, however, without fanfare or due deference to fundamental principles of stare decisis, as noted by Judge Murray "the majority has overlooked the definition of

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MICHIGAN 48226-5485
(313) 965-7900

malice applied by this Court in both Regualos v Community Hosp, 140 Mich App 455, 463; 364 NW2d 723 (1985) and Veldhuis v Allan, 164 Mich App 131, 136-137; 416 NW2d 347 (1987)." (Feyz, opinion by Murray, p 3, Apx 27a.) This clearly is in error.

Third, if, as held by the majority in connection with plaintiff's allegations based on the referral to the Health Professionals Recovery Program, "although plaintiff alleges that the referral proved unnecessary, plaintiff's complaint raises no allegations in this count which would indicate that the referral was maliciously made," then immunity must apply under any definition.

The further conclusion of all three Court of Appeals judges that all civil rights and discrimination claims necessarily would involve "malice" so as to render peer review immunity per se inapplicable is likewise in error. For example, the Persons With Disabilities Act and the ADA prohibit not only direct intentional discrimination, but disparate impact discrimination in which facially neutral policies have an adverse, but not necessarily intended, effect and impact on the protected group. See Peden v Detroit, 470 Mich 195, footnotes 6, 8; 680 NW2d 857 (2004). Likewise, such claims may turn on an employer's failure to accommodate, a failure which certainly need not be intentional and simply be inadvertent, or at most, merely negligent.

Here, in fact, plaintiff alleges discrimination based on an erroneous perception that he is disabled. If, as defendants submit, that perception was in good faith based on the apparent irrational nature of Dr. Feyz's antics in writing orders in patient charts for peer review and consultations with the Hospital President, etc, then while the referral may have been intentional it was not in bad faith or with malice. Indeed, the Court of Appeals majority notes that "although plaintiff alleges that the referral proved unnecessary, plaintiff's complaint raises no allegations in this count which would

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485
(313) 965-7900

indicate that the referral was maliciously made." As such, the discrimination claim premised in the referral would not necessarily involve malice or intentional wrongdoing.

Similarly, other civil rights laws likewise permit imposition of liability for the disparate impact of otherwise neutral policies and thus do not implicate knowing or intentional discrimination.

It is clear from the complaint itself that plaintiff repeatedly violated hospital policies and persisted in actions that were disruptive and detrimental to the delivery of patient care and reasonable operation of a hospital. There simply are no factual allegations sufficient to establish that the corrective action taken against plaintiff for his repeated failure to cooperate with medical staff, hospital staff, peer review committees and administration was carried out in malice. The hospital and medical staff have a statutory obligation to provide quality patient care and all actions taken against plaintiff were taken in furtherance of that obligation. Accordingly, this Court should affirm the trial court's determination that plaintiff failed to show malice sufficient to defeat the immunity of defendants for their peer review actions. At a minimum and in the alternative, the Court should hold that whether there in fact was malice is at best a factual question to be resolved by the trier of fact if plaintiffs' factual allegations are supported by proof after discovery.

Kitch Drutchas
Wagner Valitutti &
Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue,
Suite 2400
Detroit, Michigan
48226-5485

(313) 965-7900

III

THE COURT OF APPEALS MAJORITY CLEARLY ERRED IN REFUSING TO APPLY PEER REVIEW IMMUNITY TO THE COMMON LAW CLAIMS ASSERTED AGAINST THE MEDICAL STAFF EXECUTIVE COMMITTEE BASED ON THE MISTAKEN AND INEXPLICABLE STATEMENT THAT DEFENDANTS HAD NOT "ARGUED" THAT THE MEDICAL STAFF EXECUTIVE COMMITTEE CONSTITUTED A PEER REVIEW COMMITTEE.

The Court of Appeals majority's conclusion that plaintiff had adequately pled in avoidance of the immunity granted by the peer review statute as to the Medical Staff Executive Committee because defendants did not "argue" the Executive Committee to be a peer review entity to which the immunity of MCL 331.531 applies is both inexplicable and clearly wrong. The majority reasoned:

> Plaintiff, however, disputes that the Executive Committee has been "duly appointed" as a peer review committee. In response, defendants only argue that the Ad Hoc Committee formed to investigate the allegations against plaintiff made by the hospital constitutes a "duly appointed review committee" under the medical staff by-laws. Paragraph 57 of plaintiff's complaint, however, alleges that it is the Executive Committee, not the Ad Hoc Committee, which made the HPRP referral that is the basis for the allegations in Count V. The Ad Hoc Committee's status as a peer review committee grants that committee immunity, but that does not make the Executive Committee a peer review committee and, therefore, does not grant the Executive Committee immunity. [Feyz majority, opinion, p 5, Apx 14a]

It is defendants' position that the Court of Appeals' opinion, in ruling on the trial court's grant of summary disposition based on failure to state a claim, does not foreclose defendant from establishing factually that the Medical Staff Executive Committee is a duly appointed peer review committee, and moving for summary disposition based on the absence of a genuine issue of material fact in the future. However, defendants submit that the record before the Court of Appeals, including plaintiff's own complaint and plaintiff's response to the motion for summary disposition, so clearly establishes the Medical Staff Executive Committee to be a peer review

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MICHIGAN 48226-5485
(313) 965-7900

committee that this Court should hold the Executive Committee to be immune as well. The Court of Appeals majority's analysis is clearly flawed.

First, defendants have consistently "argued" that all defendants, including the Medical Staff Executive Committee, were peer review entities within the scope of MCL 331.531. In defendants' brief on appeal, they stated, for example:

> The executive committee's review of Plaintiff's behavior and their recommended corrective action were part of the peer review process.
>
> * * *
>
> Defendants Engaged In the Actions of A "Duly Appointed Peer Review Committee" And Did Not Act Outside The Scope Of A Review Entity.
>
> * * *
>
> All actions taken by the hospital and medical executive committee were taken in furtherance of their statutory responsibility for the quality of care rendered in the hospital. MCL 333.21513. The hospital policies and medical staff bylaws that Plaintiff was disciplined for violating and that serve as the basis for Plaintiff's complaint govern patient care.
>
> * * *
>
> All Defendants Are Entitled to Peer Review Immunity And Plaintiff's Claims To The Contrary Are Not Properly Preserved For Appeal. [Defendants' Brief on appeal, pp 22, 23, 24, Apx 124a-127a]

Where all defendants have consistently advocated that all were engaged in peer review activities and subject to immunity, the Court of Appeals' majority's conclusion that defendants did not so "argue" as to the Executive Committee is certainly misguided.

Further, as concluded by Judge Murray, it is absolutely evident from the complaint itself, as well as the medical staff bylaw excerpts offered by plaintiff himself below, that the Medical Staff Executive Committee is a peer review committee.

> Here, plaintiff alleges that the Medical Staff Executive Committee, in dealing with plaintiff, failed to adhere to the hospital by-laws and procedures. These failures resulted in, according to the complaint, violations of state and federal statutes, as well as common law claims for breach of contract and torts. There can be no dispute that the Executive Committee, which oversees the medical staff and makes all decisions

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485
(313) 965-7900

> regarding the discipline of medical staff members, is a review entity as defined by the statute. MCL 331.531 (2)(a) and (b). Additionally, the by-laws grant the Executive Committee the authority to create a "special committee," such as the Ad Hoc Committee, to investigate matters submitted to the Executive Committee.
>
> Because the Executive Committee was a review entity, its decisions are immune unless done with malice. [Feyz opinion by Murray, p 2, Apx 26a]

Plaintiff alleges throughout the complaint that the Executive Committee was involved in and responsible for the ongoing disciplinary process and investigation of plaintiff (e.g. Complaint, ¶¶ 48, 50, 52, 90, 95-97, Apx 43a-44a, 48a-49a).

Finally, reported decisions discussing the organization of Michigan hospitals likewise recognize that a Medical Staff Executive Committee necessarily is a peer review committee subject to immunity under MCL 331.533. See e.g., Veldhuis v Allan, 164 Mich App 131; 416 NW2d 347 (1987), Regualos v Community Hospital, 140 Mich App 455; 364 NW2d 723 (1985).

There is no justification for remanding for further proceedings (wherein defendants will certainly demonstrate by a motion for summary disposition based on the absence of a genuine issue of material fact motion that the Medical Staff Executive Committee is a peer review committee). The record, most clearly plaintiff's own complaint, graphically demonstrates that the Medical Staff Executive Committee is a peer review entity to which the immunity of MCL 331.531 applies.

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485
(313) 965-7900

IV

ALTERNATIVELY PLAINTIFFS' TORT AND CIVIL RIGHTS CLAIMS AGAINST THE EXECUTIVE COMMITTEE AND OTHER DEFENDANTS PREMISED ON THE HPRP REFERRAL ARE NOT REVIEWABLE DUE TO DEFENDANTS' IMMUNITY FROM LIABILITY PURSUANT TO MCL 333.16244 (1) FOR REPORTING PLAINTIFF'S CIRCUMSTANCES TO THE HEALTH PROFESSIONAL RECOVERY PROGRAM.

Michigan law obligates all health professionals to report another health professional's impairment, including substance abuse or mental illness, when the reporting health professional has "reasonable cause to believe" that the other health professional is impaired. MCL 333.16222, MCL 333.16223 (Apx 133a-134a). Health professionals who comply with the reporting requirements in good faith are immune from civil or criminal liability. MCL 333.16244 (1) (Apx 135a). There is a presumption of good faith. Id.

MCL 333.16244 provides, in relevant part:

> A person, including a state or county health professional organization, a committee of the organization, or an employee or officer of the organization furnishing information to, or on behalf of, the organization, acting in good faith who makes a report; assists in originating, investigating, or preparing a report; or assists a board or task force, a disciplinary subcommittee, a hearings examiner, the committee, or the department in carrying out its duties under this article is immune from civil or criminal liability including, but not limited to, liability in a civil action for damages that might otherwise be incurred thereby and is protected under the whistleblowers' protection act, Act No. 469 of the Public Acts of 1980, being sections 15.361 to 15.369 of the Michigan Compiled Laws. A person making or assisting in making a report, or assisting a board or task force, a hearings examiner, the committee, or the department, is presumed to have acted in good faith. [Emphasis added.]

The majority of the Court of Appeals expressly concluded that, with regard to the referral to the HPRP by the Executive Committee,". . . although plaintiff alleges that the referral proved unnecessary, plaintiff's complaint raises no allegations in this count which would indicate that the referral was maliciously made." There being, as held by

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485
(313) 965-7900

the Court of Appeals, no allegations of malice, defendants are entitled to summary disposition based on the immunity provided by MCL 333.16244(1). Plaintiff has clearly failed to plead in avoidance of the presumption of "good faith," and resulting immunity for a referral to the HPRP. As such, this Court should hold that immunity under the statute applies here.

Here, defendants had reasonable cause to believe that plaintiff had a mental impairment. His thought processes seemed to be affecting his behavior and his ability to treat patients, causing him to violate hospital policies and engage in a battle of wills with hospital administration for more than a half dozen years. As Judge Costello recognized below, if it was true that plaintiff's only concern was improving how nurses conducted medical histories of his patients, then "Plaintiff should have first taken the appropriate internal procedural steps within the hospital to change hospital policies, rather than violating such policies before attempting to change them." (Order, p 4 Memorandum of Law, Apx 4a).

Due to plaintiff's persistent irrational behavior in the face of the many attempts by Hospital administration and his peers to address his concerns through the proper channels, there was cause to believe plaintiff was impaired. The Medical Staff Executive Committee's referral of plaintiff to the HPRP was therefore mandatory pursuant to state law, and in the absence of an allegation of malice and the statutory presumption of good faith, plaintiff's claims against defendants for reporting him to the HPRP (Count IV Section 1983/5 and Count V Invasion of Privacy) or for "regarding him as disabled" (Count I MPDCRA, Count II ADA and Count III Rehabilitation Act) are not actionable.

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485
(313) 965-7900

Accordingly, the trial court's dismissal of plaintiff's discrimination claims should be reinstated for the alternative reason that defendants are immune from liability pursuant to MCL 333.16244 (1).

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485
(313) 965-7900

RELIEF REQUESTED

WHEREFORE defendants Mercy Memorial Hospital, Medical Staff of Mercy Memorial Hospital, Richard Hiltz, James Miller, D.O., John Kalenkiewicz, M.D., J. Marshall Newbern, D.O. and Anthony Songco, M.D., respectfully request that this Honorable Court reverse the judgment of the Court of Appeals and reinstate the trial court's order of summary disposition based on the applicability of the doctrine of judicial nonreview of hospital medical staffing decisions, peer review immunity under MCL 331.531, and/or HPRP referral immunity under MCL 333.16244(1).

Alternatively, if, contrary to defendants' position herein, the Court determines that either immunity does not necessarily apply to civil rights claims, or to any of the defendants based upon the factual allegations of the complaint and the current record, at a minimum, the Court should remand for further factual development as to the applicability of these immunities as to those claims and those defendants.

Respectfully submitted,

KITCH DRUTCHAS WAGNER
VALITUTTI & SHERBROOK

By: _____
SUSAN HEALY ZITTERMAN (P33392)
KAREN B. BERKERY (P38698)
Attorneys for Mercy Memorial Hospital, Medical Staff of Mercy Memorial Hospital, Richard Hiltz, James Miller, D.O., John Kalenkiewicz, M.D., J. Marshall Newbern, D.O. and Anthony Songco, M.D.
One Woodward Avenue, Suite 2400
Detroit, MI 48226
(313) 965-7905

Dated: February 9, 2006

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485
(313) 965-7900